IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 611 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL

HONOURABLE MR.JUSTICE J.R.VORA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BALUBEN WIFE OF DAHYABHAI RAMSINH SOLANKI & 1-Appellants
Versus
STATE OF GUJARAT - Respondent

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Appearance :
MR PM VYAS for Appellants
MR HM PRACHCHHAK, ADDL.PUBLIC PROSECUTOR for Respondent.

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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE J.R.VORA

Date : 08-09/03/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

The instant appeal filed under Section 374(2) of the Code

of Criminal Procedure, 1973, is directed against judgment dated April 5, 1999, rendered by the learned Additional Sessions Judge, Panchmahals at Godhra, in Sessions Case No.261 of 1998, by which the two appellants, who are mother and daughter respectively, are convicted for commission of offence punishable under Section 302 r.w.Section 114 of the Indian Penal Code and each sentenced to R.I. for life for committing murder of deceased Kailasben, who was daughter-in-law of the appellant No.1 and sister-in-law of the appellant No.2.

2. The facts emerging from the record of the case are as under :

Ms.Kailasben was daughter of one Chhatrasinh Raisinh, who was native of village Rakadia. Ms. Kailasben had lost her parents when she was very young. Therefore, she was brought up and reared by Chhatrasinh, a resident of village Sansoli, who was husband of sister of her father. The incident in question, in which Ms. Kailasben lost her life, took place on July 5, 1998. One year prior to the date of incident, Ms. Kailasben was married to Rameshbhai Dahyabhai Solanki of village Reliapura, Taluka : Godhra, District : Panchmahals. It may be stated that Rameshbhai Solanki is son of the appellant No.1 and brother of the appellant No.2. After her marriage, Ms.Kailasben started living with her in-laws. Family of her in-laws consisted of her husband, her mother-in-law i.e. appellant No.1, her father-in-

law i.e. Dahyabhai Solanki and herself. The appellant No.2 i.e. Manjulaben was a married woman and had come to her parental house a day prior to the day of incident. The appellants did not like Ms.Kailasben and, therefore, used to pick up quarrels with her on the pretext that she was not performing household work properly. However, her husband i.e.Rameshbhai was a loving husband, and because of his persuasions, Ms.Kailasben had continued to stay at the house of her in-laws and suffer cruelties meted out by the appellants. During subsistence of her marriage with Rameshbhi, Ms.Kailasben could not conceive. On July 5, 1998, Ms.Kailasben got-up and started attending her usual household-work. The appellants also got-up and picked-up quarrel with her stating that she was not knowing as to how the household-work should be performed. The appellants also abused her in filthy language. At that time, her husband i.e. Rameshbhai was present in another hut situated nearby, whereas her father-in-law had gone out. Though the appellants were taunting and abusing her, Ms. Kailasben continued to perform her household-work. At about 7.00 A.M. when she was preparing tea, the appellants poured kerosene over her body and set her ablaze. As Ms.Kailasben received burn injuries, she started shouting for help. Her husband i.e. Rameshbhai summoned a rickshaw to remove her to hospital for treatment. On way to hospital, Rameshbhai came across matador belonging to husband of sister of father of Ms.Kailasben. In the said matador, Ms.Kailasben was removed to S.S.G.Hospital,

Vadodara for treatment. After Ms.Kailasben was admitted in S.S.G.Hospital, necessary information was conveyed to police officer of Raopura Police Station, on the basis of which, Entry No.14/98 was posted on July 5, 1998 in police station diary maintained at Raopura Police Station. After the entry was posted in police station diary, Head Constable Ramanbhai Nathabhai, addressed a communication to Medical Officer, S.S.G.Hospital, Vadodara to give opinion as to whether Ms. Kailasben, who was admitted in hospital for treatment of burn injuries, was in a fit state of mind to make statement, as it was necessary to record her dying declaration. The concerned Medical Officer gave opinion on July 5, 1998 at about 12.45 hours that Ms.Kailasben was conscious and able to give statement. In view of opinion given by the Medical Officer, Police Jamadar of Raopura Police Station, Vadodara City addressed a communication dated July 5, 1998 to the Executive Magistrate, Narmada Bhuvan, Vadodara City informing him that as per police station diary Entry No.14/98, dated July 5, 1998, Ms.Kailasben, who had quarrel with her mother-in-law Baluben and sister-in-law Manjulaben, was set ablaze by them after pouring kerosene over her, and requested him to visit Ward No.E/14 of SSG Hospital, Vadodara to record dying declaration of Ms.Kailasben. Along with the intimation, a copy of intimation sent to Medical Officer to give opinion as to whether Ms.Kailasben was in a fit state of mind to make statement with endorsement of the doctor, was also forwarded to

the Executive Magistrate. The intimation sent by Police Jamadar, Raopura Police Station, Vadodara City was received by the Executive Magistrate at 13.05 hours. After receipt of abovereferredto intimations, Mr.Champaklal Hargovinddas Panchal, who was then Executive Magistrate, Vadodara went to Room No.12, Ward No.E/4 of SSG Hospital, where injured Kailasben was being treated. He introduced himself to injured Kailasben and after ascertaining that she was in a fit state of mind to make statement, recorded her dying declaration as narrated by her. After recording of dying declaration of Ms.Kailasben was over, police officer of Godhra Taluka Plice Station was informed by Head Constable Ramanbhai Nathabhai, who was on duty at Vadodara Government Hospital that pursuant to Raopura Police Station Diary Entry No.14/98, dying declaration of Ms.Kailasben, wife of Rameshbhai Dahyabhai Solanki, residing at village Reliapura, Taluka : Godhra was recorded and appropriate action be taken to enable investigating officer to collect copy of dying declaration and record complaint of injured Kailasben. On the basis of this information, necessary entry was made in the police station diary maintained at Godhra Taluka Police Station and investigation into the case was handed over to Mr.Gadhvi, who was Senior Police Sub-Inspector of Godhra Taluka Police Station at about 11.05 hours by a written intimation. On receipt of intimation, Senior Police Sub Inspector Mr.Harichand Gulabchand Gadhvi went to SSG Hospital, Vadodara and recorded complaint of injured Kailasben as

narrated by her. During the course of treatment, injured Kailasben succumbed to her burn injuries on July 11, 1998. Therefore, the investigating officer held inquest on the dead body of the deceased on July 11, 1998 between 8.15 and 9.00 hours. The investigating officer also made arrangements for sending dead body of deceased Kailasben to Government Hospital for post-mortem examination. The post-mortem examination on the dead body of the deceased was conducted by a panel of Doctors. The investigating officer drew panchnama of place of incident and recorded statements of those persons who were supposed to be conversant with the facts of the case. On completion of investigation, the appellants were chargesheeted in the Court of learned 2nd Judicial Magistrate, First Class, Godhra, for commission of offence punishable under Section 302 r.w.Section 114 IPC .

3. As the offence punishable under Section 302 IPC is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Panchmahals for trial, where it was numbered as Sessions Case No. 261 of 1998. The learned Additional Sessions Judge, Panchmahals at Godhra, to whom the case was made over for trial, framed necessary charge against the appellants at Exh.2. It was read over and explained to them. They pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Circle Officer Mr.Sabbir Husen Abbasbhai Shaikh as PW.1 at Exh.9, (2) uncle of deceased Kailasben i.e. Salamsinh Raisinh as PW.2 at Exh.12,

(3) panch Jashvantsinh Udesinh Solanki, who was present at the time of drawing panchnama of place of incident, as PW.3 at Exh.13, (4) Hasmukhbhai Chhatrasinh Solanki as PW.4 at Exh.15, (5) Vikramsinh Fatesinh as PW.5 at Exh.16, (6) Police Jamadar Balvantsinh Rupsinh as PW.6 at Exh.17, (7) Executive Magistrate Champaklal Hargovinddas Panchal as PW.7 at Exh.19, (8) Dr.Kishor Pramodrai Desai as PW.8 at Exh.23, and (9) Investigating Officer Harichand Gulabchand Gadhvi as PW.9 at Exh.26, to prove its case against the appellants. The prosecution also produced documentary evidence, such as, inquest report of the deceased at Exh.7, intimation sent by Police Jamadar of Raopura Police Station, Vadodara City to the Executive Magistrate, Narmada Bhuvan, Vadodara City to visit Ward No.E/4 of SSG Hospital, Vadodara for recording dying declaration of injured Kailasben at Exhs. 8 and 20, map of place of incident at Exh.10, panchnama of place of incident at Exh.14, entry made in police station diary maintained at Godhra Taluka Police Station pursuant to information given by Head Constable Ramanbhai Nathabhai, who was on duty at SSG Hospital, Vadodara at Exh.18, intimation by police head constable to Medical Officer, SSG Hospital to give opinion as to whether injured Kailasben was in a fit state of mind to make statement at Exh.21, dying declaration of the deceased which was recorded by Executive Magistrate Mr.Panchal at Exh.22, post-mortem notes prepared by Dr.Desai at Exh.24, complaint of injured Kailasben, which was recorded by investigating officer Mr.Gadhvi at Exh.27

etc. in support of its case against the appellants.

4. After recording of evidence of prosecution witnesses was over, the learned Judge of the trial Court explained to the appellants the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by Section 313 of the Code of Criminal Procedure, 1973. In her further statement, the appellant No.1 i.e. Baluben claimed that the relations of the appellants with the deceased were very cordial and the deceased was never subjected to cruelty by them. It was stated by the appellant No.1 that the deceased had received burn injuries accidentally and they had not committed any offence. It was further stated that at the time of incident, both the appellants were milking buffalo and cleaning stable. These defences were also advanced by the appellant No.2 in her further statement, which was recorded under Section 313 of the Code. However, it is relevant to notice that no defence evidence was led by any of the appellants to substantiate the claim advanced in their respective further statement.

5. On appreciation of evidence adduced by the prosecution, the learned Judge of the trial Court held that it was proved by the prosecution beyond reasonable doubt that deceased Kailasben died a homicidal death. The learned Judge noticed that, in all, four dying declarations of the deceased i.e. two oral dying

declarations proved by witness Salamsinh Raisinh and witness Vikramsinh Fatesinh as well as one proved by Executive Magistrate Mr.Panchal and another dying declaration in the form of complaint of the deceased proved by Investigating Officer Mr.Gadhvi, were produced on record of the case by the prosecution to substantiate charge levelled against the appellants, and that all the four dying declarations were consistent, cogent as well as trustworthy. The learned Judge noticed the contents of panchnama of place of incident and deduced that the claim advanced by the deceased in her dying declarations that the appellants had poured kerosene over her and set her ablaze, was substantiated by the contents of the panchnama of place of incident. As the dying declarations of the deceased were found to be reliable, the learned Judge also held that it was proved by the prosecution that the deceased was subjected to cruelty by the appellants. In view of abovereferredto conclusions, the learned Judge has convicted the appellants under Section 302 r.w.section 114 IPC and imposed sentences referred to earlier by judgment dated April 5, 1999, giving rise to instant appeal.

6. Mr.P.M.Vyas, learned counsel of the appellants, contended that the place where the incident had taken place, is a small room and as it was not possible for two persons to stand therein, the case of the prosecution that the appellants had poured kerosene over the deceased and set her ablaze, should

have been disbelieved by the learned Judge of the trial Court. According to the learned counsel of the appellants, if kerosene had been poured over the deceased as claimed by the deceased in her dying declarations, wall consisting of dry stalk of cotton plant would have been burnt, but, the record does not show that said wall was damaged and, therefore, the prosecution case should have been disbelieved by the learned Judge. It was argued that witness Hasmukhbhai Chhatrasinh Solanki, who is brother-in-law of the deceased, has stated in his testimony that he had seen the deceased coming out of the room and shouting for help, and that the deceased had informed him that she had received burn injuries while preparing tea on stove and, therefore, the prosecution case that the appellants had poured kerosene over the deceased and thereafter set her ablaze should have been disbelieved by the Court. The learned counsel of the appellants maintained that the evidence on record indicates that when the deceased was admitted in hospital for her burn injuries, she was surrounded by her relatives, who had tutored her and, therefore, her tutored version as reflected in her dying declarations should not have been accepted by the trial Court. It was contended that several important witnesses, such as, husband of the deceased i.e. Rameshbhai and others are not examined by the prosecution with oblique motive and, therefore, after drawing adverse inference against prosecution, charge levelled against the appellants should have been disbelieved by the learned Judge of the trial

Court. It was argued that neither Executive Magistrate had obtained medical opinion that the deceased was in a fit state of mind to make statement, before recording her dying declaration, nor Investigating Officer Mr.Gadhvi had obtained medical opinion to the effect that the deceased was in a fit state of mind to narrate her complaint and, therefore, those documents should not be acted upon while determining guilt or otherwise of the appellants. After referring to the testimony of Investigating Officer Mr.Gadhvi, it was pointed out by the learned counsel of the appellants that as per his testimony, the deceased had also stated before him that her father-in-law had also joined the appellants in pouring kerosene over her, and as an attempt was made by the deceased to implicate the father-in-law of the deceased falsely, complaint lodged by the deceased should not have been acted upon while fastening criminal liability on the appellants. The learned counsel of the appellants contended that the deceased was not sure as to who had lighted the matchstick after pouring kerosene over her and, therefore, the appellants could not have been convicted under Section 302 r.w.Section 114 IPC. It was asserted on behalf of the appellants that the learned Judge of the trial Court has failed to appreciate the evidence on record in its true perspective and, therefore, the appeal should be accepted.

7. Mr.H.M.Prachchhak, learned counsel of the State, contended that all the four dying declarations produced by the

prosecution on the record of the case have been satisfactorily proved and as they are consistent with each other, the learned Judge of the trial Court did not commit an error in placing reliance on them for the purpose of convicting the appellants under Section 302 r.w.section 114 IPC. It was argued that the incident took place in the early morning of July 5, 1998, whereas the deceased succumbed to her injuries on July 11, 1998 and dying declaration of the deceased was recorded by the Executive Magistrate on July 5, 1998, whereas complaint of the deceased was also recorded by PSI Mr.Gadhvi on July 5, 1998, which in turn, indicates that the deceased was in a fit state of mind to make statements and, therefore, the dying declarations made by the deceased should be accepted by the Court. It was further pointed out by the learned A.P.P. for the State that the oral dying declarations made by the deceased before witness Salamsinh Raisinh and witness Vikramsinh Fatesinh also stand satisfactorily proved by their trustworthy evidence and, therefore, it is wrong to contend that conviction of the appellants under Section 302 r.w.section 114 IPC is unwarranted. The learned A.P.P. for the State asserted that panchnama of place of incident fully corroborates the claim advanced by the deceased in her four dying declarations and, therefore, conviction of the appellants under Section 302 r.w.Section 114 IPC recorded by the learned Judge of the trial Court, who had advantage of observing demeanour of the witnesses, should be confirmed by this Court. It was emphasised

that cogent and convincing reasons have been recorded by the learned Judge of the trial Court for convicting the appellants under Section 302 r.w.section 114 IPC and as the learned counsel of the appellants has failed to dislodge those weighty reasons, the appeal, which lacks merits, should be dismissed.

8. This Court has heard Mr.P.M.Vyas, learned counsel of the appellants and Mr.H.M.Prachchhak, learned counsel of the State, at length and in great detail. The evidence led in the case has been read and re-read by the learned advocates of the parties. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

9. It is not the case of the prosecution that murder of the deceased by the appellants was witnessed by any one. No direct evidence is adduced by the prosecution to substantiate the charge of murder of the deceased levelled against the appellants. In order to prove its case against the appellants, the prosecution has heavily relied upon the dying declarations made by the deceased. Before appreciating the evidence of the witnesses and the contents of the dying declarations, it would be advantageous to refer to law relating to dying declaration as settled by the Supreme Court in catena of reported decisions. Section 32(1) of the Indian Evidence Act, 1872 is an

exception to the general rule that hearsay evidence is not admissible evidence and unless evidence is tested by cross-examination, it is not creditworthy. Under Section 32 when a statement is made by a person as to the cause of death or as to any of the circumstances, which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased, called the dying declaration, falls in that category provided it has been made by the deceased while in a fit mental condition. It is well settled that conviction can be based on the dying declaration itself provided it is satisfactory and reliable. A dying declaration made by a person on the verge of his death has a special sanctity, as at that solemn moment, a persons is most unlikely to make any untrue statement. The sanctity attached to dying declaration is that a person on the verge of death would not commit sin of implicating somebody falsely. The shadow of impending death is by itself the guarantee of truth of the statement made by the deceased regarding cause of circumstances leading to his death. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the person is at the point of death and when every hope of this world is gone. At that point of time every motive to falsehood is silenced and the mind is induced by the

most powerful consideration to speak the truth. Such a solemn situation is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice. A dying declaration, therefore, enjoys almost sacrosanct status as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the Courts, it becomes very important and reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration by itself can be sufficient for recording conviction even without looking for any corroboration. However, if there are any infirmities of such nature warranting further assurance then the Courts have to look for corroboration. The rule of corroboration requires that the dying declaration be subjected to close scrutiny since the evidence is untested by cross-examination. The declaration must be accepted, unless such declaration can be shown not to have been made in expectation of death or to be otherwise unreliable. Any evidence adduced for this purpose can only detract from its value, but does not affect its admissibility. It is also well settled that it is not necessary that recording of dying declaration should be in the form of question and answer. One of the important tests of reliability of

dying declaration is that the person who recorded it must be satisfied that the deceased was in a fit state of mind. Generally, the following three tests have been devised in judicial pronouncements in order to answer the question whether the dying declaration is true:-

(1) Was the victim in a position to identify the assailant/s ?

(2) Whether the version narrated by the victim is intrinsically sound and accords with probabilities ?

(3) Whether any material part is proved to be false by other reliable evidence ?

10. In the light of above principles, this Court will have to consider the dying declarations produced by the prosecution in instant case and ascertain the truth with reference to those dying declarations made by the deceased. The record shows that first dying declaration was recorded by Executive Magistrate Mr.Champaklal Hargovinddas Panchal, who is examined by the prosecution at Exh.19. The witness has stated that in the month of July 1998 he was discharging duties as Executive Magistrate, Vadodara, and on July 5, 1998, he had received a yadi from the constable of Raopura Police Station, copy of which he had returned after making endorsement on it to the effect that

original was received by him. The witness has mentioned that along with yadi, the Head Constable had also handed over another intimation bearing endorsement by the Doctor that patient was conscious and in a fit state of mind to make statement. During the course of his examination-in-chief, the witness produced those two yadies at Exhs.20 & 21. The witness has mentioned that on receipt of yadi, he had immediately gone to Room No.12 of Ward No.E/4 of SSG Hospital, where the deceased was being treated. The witness has stated that he had asked the relatives of injured Kailasben and police constable to go out of room and after they had gone out of room, he had put certain preliminary questions to the injured before recording her dying declaration. The witness has stated that he had asked injured Kailasben as to how the incident had taken place and the particulars as mentioned by her were noted down by him. The witness has further stated that after recording of dying declaration was over, the same was read over to the injured and the injured had appended her thumb impression thereon in token of the same having been recorded correctly. The witness produced dying declaration of the deceased at Exh.22 on the record of the case.

11. In his cross-examination, the witness has stated that when he had gone to record dying declaration of the injured, report of doctor was with him, but, he was not knowing the name of the doctor. The witness has stated that yadi bearing

endorsement that patient was conscious and in a fit state of mind to make statement was signed by the Medical Officer, but, the designation of the officer, who had made the said endorsement was not mentioned on the yadi. The witness has further mentioned in his cross-examination that he had not thought it fit to make any inquiry as to which doctor had made the endorsement on the yadi which was handed over to him, nor he had suspected that endorsement which was on the yadi was suspicious in nature. In his cross-examination, the witness has specifically asserted that the patient was conscious and capable of giving replies. The suggestion made by the defence that both the hands of the deceased were burnt and, therefore, she was not able to put her thumb impression on the dying declaration, is emphatically denied by him. The witness has further stated in his cross-examination that after he had commenced recording of dying declaration of the injured, he had not thought it fit to obtain opinion of the doctor whether the deceased was in a fit state of mind. The witness has mentioned that he had proceeded on the footing that endorsement made on the yadi to the effect that patient was conscious and in a fit state of mind to make statement, was made by the Medical Officer. The witness has further stated in his cross-examination that before he had gone to SSG Hospital, the constable concerned had made report indicating as to how the injured had received burn injuries. The witness has further stated in his cross-examination that he was not knowing the

name of police officer who had come to deliver yadi at his residence. According to this witness, at the time when he had gone to SSG Hospital for recording dying declaration of the injured, there were about 4 to 5 persons near the cot of the injured, but, he had not made any attempt to know their names, nor their antecedents. The witness has further stated in his cross-examination that he had not made any attempt to find out as to whether the injured was tutored by the persons who were sitting by her side when he had gone to record her dying declaration. According to him, after recording dying declaration, he had handed over the same to the police man. It was further explained by him that carbon copy of the dying declaration was also prepared simultaneously, which was retained by him. The witness has stated in his cross-examination that when he had gone to SSG Hospital for recording dying declaration of injured Kailasben, he had not met any police man. According to him, the yadi from police requesting him to go to SSG Hospital for recording dying declaration of injured Kailasben was received by him at 1.05 hours and that he had reached the hospital by 13.40 hours. According to him, he had recorded dying declaration of the deceased on a printed form. The witness has mentioned in his testimony that in the printed form it was indicated that dying declaration was recorded after ascertaining from the Doctor that the injured was in a fit state of mind to make statement, but, in fact, he had not ascertained from any doctor or staff-nurse as to

whether the injured was in a fit state of mind to make statement. According to this witness, he had asked the staff-nurse attending injured Kailasben as to whether Ms.Kailasben was to be given any treatment, as he was inclined to record her dying declaration and that as he was informed by the staff-nurse that no further treatment was to be given to the injured, he had commenced recording of dying declaration of the injured. The witness has mentioned that first of all he had introduced himself to the injured and thereafter asked her about her name, age etc. and that he had recorded dying declaration of the injured in question and answer form. The witness has also stated that the place where the deceased was being treated for her burn injuries was smelling of kerosene and no other peculiar smell was coming from the said place. According to him, he had not thought it fit to ascertain from the injured as to whether she was literate. The witness has further asserted that he was able to perceive that because of burn injuries, the injured was writhing in pain and that she had sustained 80 to 90 percentage burn injuries. The suggestion made by the defence that he had recorded dying declaration of the deceased as mentioned in police yadi, is emphatically denied by him. The suggestion made by the defence that injured was writhing in pain and was not able to speak, is also emphatically denied by him. It is further explained by the witness that as the injured woman was not in a position to sign, he had obtained her thumb impression on her dying

declaration

12. This is all what transpires from the testimony of Executive Magistrate, who had recorded dying declaration of the deceased. It is well to remember that Executive Magistrate was neither known to the appellants nor to the deceased. The Executive Magistrate had gone to SSG Hospital, Vadodara in discharge of his official duties for recording dying declaration of the deceased pursuant to yadi forwarded to him by police officer of Raopura Police Station, Vadodara City. It could not be even remotely suggested to the witness that he was either interested in the deceased or her relatives or was on inimical terms with the appellants and had, therefore, concocted the dying declaration of the deceased to implicate the appellants falsely. One of the important tests of reliability of dying declaration is that the person, who recorded it, must be satisfied that the deceased was in a fit state of mind to make statement. On re-appreciation of testimony of Executive Magistrate, this Court finds that he was fully satisfied that he was recording dying declaration of injured Kailasben, who was then in a fit state of mind to make statement. The plea that the Executive Magistrate had not obtained opinion of any Doctor of SSG Hospital to the effect that the deceased was in a fit state of mind to make statement before recording her dying declaration and, therefore, dying declaration recorded by him should be discarded from

consideration is devoid of merits. This point has been considered by Five Judge Constitution Bench of Supreme Court in Laxman V. State of Maharashtra, (2002)6 SSC 710. The Supreme Court, after reviewing law on the point, has made following pertinent observations in Paragraphs 4 & 5 of the reported decision :-

> “Bearing in mind the aforesaid principle, let us now examine the two decisions of the Court which persuaded the Bench to make the reference to the Constitution Bench. In Paparambaka Rosamma V. State of A.P., the dying declaration in question had been recorded by a Judicial Magistrate and the Magistrate had made a note that on the basis of answer elicited from the declarant to the questions put he was satisfied that the deceased is in a fit disposing state of mind to make a declaration. The doctor had appended a certificate to the effect that the patient was conscious while recording the statement, yet the Court came to the conclusion that it would not be safe to accept the dying declaration as true and genuine and was made when the injured was in a fit state of mind since the certificate of the doctor was only to the effect that the patient is conscious while recording the statement. Apart from the aforesaid conclusion in law the Court had also found serious lacunae and ultimately did not accept the dying declaration recorded by the Magistrate. In the letter decision of this Court in Koli Chunilal Savji vs. State of Gujarat it was held that the ultimate test is whether the dying declaration can be held to be a truthful one and voluntarily given. It was further held that before recording the declaration the officer concerned must find that the declarant was in a fit condition to make statement in question. The Court relied upon the earlier decision an in Ravi Chander v. State of Punjab wherein it had been observed that for not examining by the doctor the dying declaration recorded by the Executive Magistrate and the dying declaration orally made need not be doubted. The Magistrate being a disinterested witness and a responsible officer and there being no circumstances or material to suspect that the Magistrate had any animus against the accused or was in any way interested for fabricating a dying declaration, question of doubt on the declaration, recorded by the Magistrate does not arise.

> The Court also in the aforesaid case relied upon the decision of this Court in Harjit Kaur v. State of Punjab wherein the Magistrate in his evidence had stated that he had ascertained from the doctor whether she was in a fit condition to make a statement and obtained an endorsement to that effect and merely because an endorsement was made not on the declaration but on the application would not render the dying declaration suspicious in any manner. For the reasons already indicated earlier, we have no hesitation in coming to the conclusion that the observations of this Court in Paparambaka Rosamma v. State of A.P. (at SCC p. 701 para 8) to the effect that
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> > "in the absence of a medical certification that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a Magistrate who opined that the injured was in a fit state of mind at the time of making a declaration."
>
> has been too broadly stated and is not the correct enunciation of law. It is indeed a hypertechnical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind especially when the Magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he recorded the dying declaration. Therefore, the judgment of this Court in Paparambaka v. State of A.P., must be held to be not correctly decided and we affirm the law laid down by this Court in Koli Chunilal Savji v. State of Gujarat".

13. Applying the principles laid down by the Supreme Court in above-quoted decision to the facts of instant case, this Court finds that it was not necessary at all for the Executive Magistrate to obtain any certificate from the Doctor to the effect that injured Kailasben was in a fit state of mind to make statement. The statement contains certain facts, which could not have been imagined by the Executive Magistrate at all. Those facts must have been within the special knowledge

of the deceased and, therefore, this Court finds that the statement of the deceased, which was voluntarily made by her and correctly recorded by the Executive Magistrate must be taken into consideration while determining the guilt or otherwise of the appellants.

14. The dying declaration recorded by the Executive Magistrate is produced by the prosecution at Exh.22. It is in Gujarati language and free translation of the same into English reads as under :-

"As per report dated 5.7.98 of head constable, Raopura Police Station, Smt. Kailasben, wife of Rameshbhai Dahyabhai Solanki is under medical treatment in Ward No.E/4 of SSG Hospital. There is opinion in writing by the medical officer that patient is conscious and in a fit state of mind to make statement and, therefore, after contacting the patient, I have started recording the dying declaration of the injured:

(1) Time and date on which recording of dying declaration was commenced :

Date: 5.7.98

Time : 13.40 hours

Place : SSG Hospital, Vadodara

Ward No. E-4

Room No. 12

Bed Number :

(2) What is your name ? : Kailasben, wife of Rameshbhai Dahyabhai Solani.

(3) What is your age ? : 18 years.

(4) Please state your birth-date, if you remember: I do not remember my birth-date

(5) Where do you stay ? : Ratanpur-Relia, Tal.Godhra.

(6) What is address of your parental house ? : Sansoli, Tal. Kalol, Dist. Panchmahals.

(7) What are you doing ? : agricultural work

(8)/(9) What has happened to you ? :

My sister-in-law poured kerosene over me and my mother-in-law also poured kerosene over me and thereafter set me on fire. I was not liked by them and, therefore, I am set ablaze. Name of my mother-in-law is Baluben and name of my sister-in-law is Manjulaben. My sister-in-law got married this year and she has come to my house yesterday. My husband has another hut. He was there at the time of incident. In the house we three alone were present. I have no issue. My marriage took place last year. My father-in-law had gone outside. I have been brought to hospital by my husband. Since yesterday my mother-in-law and sister-in-law were quarreling with me regarding household work to be performed by me. I had not informed any one about cruelty meted out to me. No dowry demand was made from me. I had no trouble from my husband. When I was preparing tea, kerosene was poured

over me by my mother-in-law and sister-in-law and thereafter I was set on fire.

(10) Who are responsible for the incident in question ?

My mother-in-law and sister-in-law had poured kerosene over me and set me ablaze.

(11) Who were present in the house at the time of incident ? As stated above.

(12) Do you want to state anything further ? No.

During the course of recording of dying declaration, except me and the Executive Magistrate, no one was present. My statement has been read over to me and it is recorded as narrated by me.

I have appended my thumb-impression.

(13) Date and time by which recording of dying declaration was completed: Date: 5.7.98, Time: 14.05 Hrs.

Before me : C.M.Panchal

Executive Magistrate
Vadodara and
Mamlatdar, Vadodara

Thumb Impression

Original is received : 5.7.98 at 14.10 hours
Head Constable Ramanbhai
Raopura Police Station”

15. A bare perusal of the dying declaration recorded by the Executive Magistrate makes it evident that the deceased was set ablaze after kerosene was poured over her by the appellants. The dying declaration does not indicate at all that the

deceased had received burn injuries accidentally while preparing tea. AS the dying declaration recorded by the Executive Magistrate is proved by him satisfactorily, the same will have to be acted upon for determining guilt of the appellants. If the same is acted upon, there is no manner of doubt that the appellants had poured kerosene over the deceased and set her ablaze, as a result of which, ultimately, the deceased had died.

16. Yet another dying declaration of the deceased was recorded by P.S.I. Mr.Gadhvi in the form of complaint of the deceased.

17. The testimony of investigating officer Mr.Gadhvi recorded at Exh.26, makes it evident that on July 5, 1998, he was discharging duties as Senior Police Sub-Inspector of Godhra Taluka Police Station. According to him, at about 23.05 hours on July 5, 1998, he had received a written yadi from P.S.O. Of Godhra Taluka Police Station informing him that Ms.Kailasben, wife of Rameshbhai Dahyabhai Solanki, resident of Ratanpur-Relia was set on fire by her mother-in-law and sister-in-law, and as dying declaration of the deceased was already got recorded, he should make arrangement to send investigating officer to SSG Hospital, Vadodara for recording complaint of the injured. The witness has mentioned that on receipt of yadi, he had visited SSG Hospital, Vadodara and contacted injured

Kailasben who was being treated in Burns-Ward of the Hospital. The witness has mentioned that the injured was fully conscious and on interrogation, she had informed him that in the early morning, her mother-in-law, sister-in-law and father-in-law had poured kerosene over her and set her ablaze. The witness has further mentioned before the Court that in view of the statements made by injured Kailasben he had noted down detailed complaint of injured Kailasben as narrated by her. According to this witness, after recording of first information report was over, he had read over the same to injured Kailasben and that injured Kailasben had appended her thumb impression in token of the same having been recorded correctly. The witness has produced complaint of the deceased at Exh.27. According to this witness, after the complaint was reduced into writing, the same was forwarded to PSO of Godhra Taluka Police Station for registration on the basis of which the offences were registered against the appellants. The witness has mentioned that thereafter he had taken over the investigation of the case and recorded statements of those persons who were supposed to be conversant with the facts of the case. The witness has mentioned before the Court that thereafter he had drawn panchnama of place of incident and seized certain burnt pieces of paper. The witness has mentioned that inquest on the dead body of the deceased was held by him and thereafter dead body was sent for post-mortem examination. According to this witness, as there was sufficient evidence against the

appellants, they were arrested and chargesheeted. In his examination-in-chief, the witness has mentioned that he had recorded police statement of witness Hasmukhbhai Chhatrasinh Solanki, who had stated in his statement that on being asked to Kailasben as to how she had received burn injuries, he (Hasmukhbhai) was informed by her that her mother-in-law and sister-in-law had poured kerosene over her and set her ablaze.

18. In his cross-examination, the witness has mentioned that he had reached SSG Hospital, Vadodara at about 1.30 to 1.45 A.M., but, had not contacted the doctor. He has mentioned in his cross-examination that he was not knowing as to what was the percentage of burn injuries sustained by the deceased. The witness has mentioned that he had not read post-mortem notes. According to him, he was of the opinion that it was not necessary for him to obtain certificate from the doctor to the effect that the injured was in a fit state of mind before recording the complaint of the deceased. The witness has stated that before the complaint was recorded, he had received *vardhi* and, therefore, he was knowing as to who had set the deceased on fire. The witness has explained in his cross-examination that on the basis of *vardhi,* there was no reason not to register complaint. The witness has further stated that when he had visited injured Kailasben at the Hospital in the early hours of July 6, 1998, her husband and other relatives were also present at the Hospital. The witness has mentioned that he

had recorded police statements of those persons who were relatives of injured Kailasben including police statement of her husband. The suggestion made by the defence that he had recorded statement of injured Kailasben without getting concurrence from her husband, is denied by him. The suggestion made by the defence that the deceased was shouting, as she was writhing in pain, is also emphatically denied by him. According to this witness, injured Kailasben was in full senses and was in a position to converse. The witness has clarified that he had not made any inquiry as to whether the injured was literate and that he had not asked any question to the injured as to whether she was literate or not, nor had he asked her relatives as to whether the injured was literate. During the course of cross-examination it was suggested to him that he was knowing that the deceased had studied upto 6th Std., but, in reply to the said suggestion, it was mentioned by him that he was not knowing that the deceased had studied upto 6th Std. The suggestion made by the defence that he had not obtained signature of injured Kailasben, though he was knowing that she was literate, is emphatically denied by him. What is clarified by the witness in his cross-examination is that injured Kailasben was not in a position to sign and, therefore, he had obtained her thumb impression on her complaint. The witness has further mentioned before the Court that after the complaint was read over to her, he had asked injured Kailasben to sign the same, but, in reply thereto, injured Kailasben had expressed

her inability to sign the same and, therefore, he had obtained her thumb impression on her complaint. The witness has stated that this fact is not mentioned in the complaint of the deceased and there was no reason for not mentioning the said fact in the complaint itself. The suggestion made by the defence that no complaint at all was lodged by injured Kailasben and that he had obtained thumb impression of another person on the so-called complaint of injured Kailasben, is emphatically denied by him. The witness has further stated in his cross-examination that he had recorded police statement of uncle of injured Kailasben after the complaint narrated by her was reduced into writing, but, he was not knowing at what time the statement of uncle of injured Kailasben was recorded. The cross-examiner wanted to know from the witness as to whether he was knowing as to when the police statement of husband of injured Kailasben was recorded, and in answer to the same, the witness replied that he was not able to say as to at what time police statement of husband of injured Kailasben was recorded. According to this witness, no specific information was received by him as to who had ignited fire by lighting the matchstick. According to this witness, he had recorded police statement of witness Vikramsinh and it was stated by him therein that he was waiting at Kalol S.T.Bus Stand to board a bus for Vadodara. Mr.Gadhvi has admitted in his cross-examination that it was stated by witness Vikramsinh in his police statement that he had learnt that daughter of his maternal uncle i.e.

Ms.Kailasben was set on fire by her mother-in-law and sister-in-law, as quarrel had taken place relating to household work. It was also asserted by witness Gadhvi that it was also mentioned by Vikramsinh in his police statement that he had learnt about this, as he had conversation with injured Kailasben, but, it was not stated by the said witness Vikramsinh in his police statement that information was conveyed to him by her. The witness has admitted that he had recorded police statement of witness Salamsinh Raisinh, who was serving in police department. According to him, father of witness Vikramsinh was P.S.I. The suggestion made by the defence that he had lodged/registered a false complaint against the appellants at the instance of police personnel, who were relations of injured Kailasben, is emphatically denied by him.

19. This is what emerges from the testimony of witness Mr.Gadhvi. His testimony also shows that pursuant to yadi received from PSO of Godhra Taluka Police Station, he had visited SSG Hospital, Vadodara and after contacting injured Kailasben who was being treated, had recorded complaint as narrated by injured Kailasben. His testimony makes it very clear that at the time when he had contacted injured Kailasben, he had found that she was fully conscious and capable of making statements. It may be mentioned that the deceased was an unfortunate girl, who had lost her parents when she was of young age and, therefore, there was no special reason for

Mr.Gadhvi to take any special interest in her and concoct a false case against the appellants, who were not known to him at all. Mr.Gadhvi had visited SSG Hospital for performing his official duties and in discharge of his official duties, he had recorded complaint of injured Kailasben as narrated by her. Though a suggestion was made to this witness that he had concocted complaint of the deceased against the appellants at the instance of police officers, nothing could be brought on record to substantiate the said baseless suggestion. As observed earlier, the incident in question had taken place in the early morning of July 5, 1998, whereas the deceased had expired on July 11, 1998. It is nobody's case that during this interregnum period, the deceased had lost consciousness and/or was not able to speak. The reliable testimony of PSI Mr.Gadhvi establishes beyond pale of doubt that not only the deceased was conscious, but, was able to make statements and that he had recorded complaint of injured Kailasben as narrated by her. The argument that this witness had also not obtained any certificate from Medical Officer indicating that injured Kailasben was in a fit state of mind to narrate her complaint and, therefore, the complaint recorded by this witness should be discarded from consideration, has no substance whatsoever. It is relevant to notice that Mr.Gadhvi was a senior police officer. He was aware of his duties. He was also aware of the fact that he had gone to hospital for the purpose of recording complaint of injured Kailasben. The record further shows that

after putting preliminary questions to her, PSI Mr.Gadhvi had satisfied himself that injured Kailasben was conscious and capable of making statements. Under the circumstances, non-obtaining of certificate from Medical Officer to the effect that injured Kailasben was in a fit state of mind to make statements, before recording her F.I.R., is of no consequence.

20. The prosecution has produced F.I.R. lodged by injured Kailasben at Exh.27. It is in Gujarati language and free-translation of the same into English is as under :

“Godhra Taluka P.Stn. I.CR.No.204/98. 307 & 114 IPC
Time and date of offence : at about 7.00 AM on 5.7.1998
Time at which commission of offence was disclosed: On 6.7.1998 at 2.30 A.M. in SSG Hospital.
Distance between the place of incident and Godhra Taluka Police Station : The incident took place at village Ratanpur-Relia, which is at a distance of 5 Kms from the Police Station.
Accused :
(1) Baluben Dahyabhai Solanki
(2) Manjulaben Dahyabhai Solanki
Both residents of village Ratanpur-Relia, Tal.Godhra.

My name is Kailasben, wife of Rameshbhai Dahyabhai Solanki. My age is 18 years. I am doing household work and residing at village Ratanpur-Relia, Taluka : Godhra, District : Godhra-Panchmahals.

On being asked, I state that I am residing with my husband, in-laws and sister-in-law at the address stated above. My parental house is situated at village Sansoli, Taluka : Kalol. My parents have expired and, therefore, I was brought up by the husband of sister of my father, who is residing at village Sansoli. My marriage had taken place one year before the incident. My husband is staying at the village and doing agricultural work. After marriage, my mother-in-law and sister-in-law were quarreling with me on trivial matters and were harassing and subjecting me to cruelty. My husband was the only son of his parents and he was persuading me to reside with my in-laws. Because of good nature of my husband, I was suffering cruelty. I have no issue.

Yesterday, in the morning, my mother-in-law Baluben and sister-in-law Manjulaben had started quarreling with me stating that I was not knowing as to how household work should be performed. So saying, they had abused me in filthy language. My husband was in another hut, whereas my father-in-law had gone out. I had ignored taunts of my mother-in-law and sister-in-law, and was preparing tea at about 7.00 A.M. At that time, my mother-in-law Baluben and sister-in-law Manjulaben came and poured Kerosene over me and set me ablaze. I raised shouts, as a result of which, persons residing nearby collected and my husband took me for treatment in a rickshaw. On way, we came across Matador belonging to husband of sister of my father, wherein I was removed to SSG Hospital, Vadodara. As I am set

ablaze, I have received burn injuries over my whole body. No demand regarding dowry was made from me, but, my mother-in-law Baluben and my sister-in-law Manjulaben were always taunting me and harassing me on trivial matters, as I was not liked by them. In the early morning of Yesterday, they had picked up false quarrel with me and after pouring kerosene over me, had set me ablaze. Therefore, I am requesting to take appropriate action against them.

This is my complaint and it is correctly recorded as narrated by me.

Right hand thumb impressiong of
Kailasben, wife of Ramesh Dahya
Solanki.

In my prsence
Sd/- Illegible
Senior P.S.I. Godhra
Taluka Police Station”

21. A bare reading of the complaint of the deceased also makes it evident that at the time of incident, the deceased was preparing tea and at that time, the appellants had poured kerosene over her and set her on fire. The facts mentioned by the deceased could not have been imagined by the police officer, who reduced complaint of injured Kailasben into writing. It is well settled that statement by victim recorded as FIR should be treated as dying declaration if the victim succumbs to his injuries. In Munnu Raja and another v. The State of Madhya Pradesh, AIR 1976 SC 2199, it is held that where after making statement before police, the victim succumbs to his injuries, the statement can be treated as a dying

declaration and is admissible under Section 32(1) of the Evidence Act, 1872. Therefore, the complaint lodged by the deceased and recorded by PSI Mr.Gadhvi will have to be treated as a dying declaration of the deceased. This dying declaration also fully establishes that the appellants had poured kerosene over the deceased and had thereafter set her on fire, as a result of which, ultimately she had died. The prosecution has further relied upon upon two dying declarations of deceased Kailasben made before two witnesses. They are (1) Salamsinh Raisinh, examined by the prosecution as PW.2 at Exh.12, and (2) Vikramsinh Fatesinh, examined by the prosecution as PW.5 at Exh.16. Witness Salamsinh Raisinh in his testimony before the Court has stated that his native village is Rakadia and that he had two other brothers. According to him, Ms.Kailasben was his niece and that her father Chhatrasinh was his brother. The witness has stated that deceased Kailasben was staying with his brother-in-law. According to this witness, marriage of Kailasben had taken place with Rameshbhai of village Relia in the year 1997 and the name of mother-in-law of Kailasben was Baluben, whereas name of sister-in-law of Kailasben was Majulaben. According to this witness, he had received a telephonic message from PSO of Godhra Taluka Police Station that his niece had sustained burn injuries and was admitted in Vadodara Hospital, and on receipt of information, he had gone to the hospital at Vadodara. The witness has mentioned that when he had gone to hospital at Vadodara, he was accompanied by

his wife also. According to this witness, Ms.Kailasben was admitted in Burns Ward of the Hospital and was fully conscious. The witness has asserted that he had a talk with his niece and that his niece had stated before him that she was set on fire by her sister-in-law and mother-in-law. The witness has mentioned that his niece had expired after 4 to 5 days and that his police statement was recorded. According to this witness, after her marriage, his niece Kailasben was residing at the place of her in-laws and was visiting his house on occasions. The witness has mentioned that when Kailasben was visiting his house on certain occasions, she had informed him that she was being subjected to cruelty by her mother-in-law and sister-in-law, as she was not liked by them. The witness has further stated that before the incident had taken place, his niece had visited his house and mentioned about cruelty meted out to her, as a result of which, he had visited her in-laws and scolded mother-in-law and sister-in-law of the deceased and asked them to behave properly with the deceased, as she had lost her parents. The witness has mentioned that the deceased was set on fire after pouring kerosene over her.

22. In his cross-examination, the witness has mentioned that since childhood, deceased Kailasben was staying at the house of husband of sister of her father. The witness has mentioned that her *Fuva* was treating and keeping Ms.Kailasben as his own daughter and that her Fuva had solemnized her marriage at

village Sansoli. The witness has mentioned that house of Fuva of deceased Kailasben was quite nearby to the house of her in-laws and, therefore, she was often visiting house of her Fuva. The witness has stated in his cross-examination that he was not remembering the date on which Ms.Kailasben had last visited his residence, but, has mentioned that she was normally visiting his residence on the day of Rakshabandhan. The witness has mentioned that sister-in-law of deceased Kailasben was married and that he had not collected any people at the place where sister-in-law of deceased Kailasben was staying. According to this witness, he was serving in police department since 15 years. It is admitted by him that it was not stated by him in his police statement that the deceased had stated before him that she was being subjected to cruelty, as she was not liked by her in-laws. The witness has further mentioned that deceased Kailasben had studied upto 5th or 6th Std. and that she had not written any letter to him informing him that she was being subjected to cruelty by her in-laws. The witness has further mentioned that he had not informed any one in his village that his niece was subjected to cruelty by her in-laws. According to this witness, he had received a telephonic message at about 3.00 P.M. and on inquiring in the office, he had learnt that one of his relatives had telephoned him, but, he was not knowing as to who was that relative. The witness has further stated that after receipt of information, he had reached the hospital within half an hour and till he reached

the hospital, he had no idea as to how Kailasben had sustained burn injuries. The witness has mentioned that Vijay is his nephew and so also Vikram. The suggestion made by the defence that Ramila, who is wife of his younger brother, was also present when he had visited the hospital, is emphatically denied by him. The witness has claimed in his cross-examination that he had met those persons who were present at the hospital and tried to know from them as to how the incident had taken place, and that he was informed by those persons as to how the incident had taken place. The witness has stated in his cross-examination that his police statement was recorded in the night of 6th July at about 2.30 or 3.00 A.M. by PSI Mr.Gadvhi. The witness has clarified that when he had visited SSG Hospital, Vadodara, PSI Mr.Gadhvi was not present, but Mr. Gadhvi had come to the hospital at about 2.00 A.M. on July 6, 1998. The witness has mentioned in his testimony that he was no knowing that the deceased had given complaint, but, he had found that some persons were near the cot of the deceased. According to this witness, the deceased had sustained burn injuries over her whole body and that she was shouting because of pain resulting from burn injuries. The witness has further mentioned that he had not contacted any doctor. The suggestion made by the defence that who had set her ablaze was not mentioned by him in his police statement, was emphatically denied by him. In his cross-examination also it was asserted by the witness that he had asked injured Kailasben as to how she

had received burn injuries and before that also he had information as to how the deceased had received burn injuries. According to this witness, the first sentence uttered by injured Kailasben was that in the morning, a quarrel had taken place. The witness has mentioned that the deceased was writhing in pain and, therefore, he had not thought it fit to put further questions to her and inconvenience her. According to his witness, opposite the house of Kailasben, there was a stable. The suggestion made by the defence that in view of serious burn injuries sustained by the deceased, the deceased was not in a position to speak with him, is emphatically denied by him.

23. Again, witness Vikramsinh Fatesinh, examined by the prosecution at Exh.16, has stated in his testimony before the Court that Kailasben was daughter of his maternal uncle. The witness has mentioned that Kailasben was staying at his house since her childhood. According to this witness, after the incident, somebody had informed him that his sister kailasben was set on fire and, therefore, he had telephoned his father and in the company of his father had gone to Kalol in a Tempo from Sansoli. The witness has stated that from Kalol, he had gone to Civil Hospital, Vadodara and that his sister had expired during the course of treatment. The witness has mentioned that he had a talk with his sister Kailasben, who had stated before him that she was set on fire by her mother-in-law

and sister-in-law after pouring kerosene over her. According to this witness, it was also stated by his sister that as frequent quarrels were taking place, she was set on fire. The witness has mentioned that his police statement was recorded. In his cross-examination, the witness has stated that his police statement was recorded on the next day of the incident at about 2.00 A.M. The witness has mentioned that he was not knowing particulars of person, who had come to inform him that his sister was set on fire, but, he was sure that the said person was from village Ratanpur. This witness is also cross-examined at length, but, nothing could be brought on record to impeach his credibility.

24. The two witnesses, whose evidence is discussed above, have categorically stated that when they had visited injured Kailasben, who was being treated at SSG Hospital,Vadodara, they had talk with injured Kailasben and she had informed them that the appellants had poured kerosene over her and set her on fire. It may be stated that witness Salamsinh was a police constable, whereas father of witness Vikramsinh was PSI. However, their evidence cannot be discarded on the ground that one of them was a constable and another was son of a police officer. The witnesses have spoken about the oral dying declaration made by the deceased in a most natural manner, without making any noticeable improvements and/or embellishments. Though these witnesses have been cross-examined

at length, nothing could be brought on record to impeach their credibility. No major omissions or contradictions have been brought on record by the defence with reference to their earlier police statements. The plea that everything was concocted against the appellants at the instance of police constable Salamsinh, is merely stated to be rejected. The record does not show that witness Salamsinh had, in fact, played any role in prosecution of the appellants. It is well to remember that injured Kailasben was real niece of witness Salamsinh and, therefore, if Salamsinh had visited the hospital to inquire about health of his niece, there was nothing wrong in it, nor any motive could be attributed to the prosecution that a false case was foisted upon the appellants at the instance of witness Salamsinh. Thus, the dying declarations, which are referred to by the abovenamed two witnesses, also establish that the appellants were perpetrators of crime in question.

25. The evidence adduced by the prosecution establishes beyond doubt that the dying declarations were made by the deceased while she was in fit mental condition. The dying declarations have been proved by reliable testimony of four witnesses. They are consistent as well as reliable. It is well to remember that if the prosecution had been inclined to lodge a false case regarding death of deceased Kailasben, they would not have spared her husband Rameshbhai, or her father-in-law,

but, at no point of time any attempt was made by the deceased to implicate her husband or father-in-law. This fact is guarantee for truthfulness of the facts narrated by the deceased in her dying declarations. All the four dying declarations are consistent with each other. The deceased, who was victim, was in a position to identify her assailants. The version narrated by the victim is intrinsically sound and accords with probabilities. No material part of any of the dying declarations is found to be false with reference to other evidence on record. Therefore, this Court is of the firm opinion that the learned Judge of the trial Court did not commit any error in placing reliance on the four dying declarations of the deceased for the purpose of convicting the appellants for commission of offence punishable under Section 302 r.w.section 114 IPC.

26. Further, the panchnama of place of incident produced by the prosecution at Exh.14 is tale-telling. The panchnama of place of incident has been proved through the testimony of witness Jashvantsinh Udesinh Solanki recorded at Exh.13. The panch witness has specifically mentioned that he was called at the house of Rameshbhai, as panchnama of place of incident was to be drawn, and that in his presence condition of the house wherein incident had taken place was noted down. The witness has described as to how three rooms of the house belonging to Rameshbhai were located. According to the witness, first of

all, there was an osari, after which a room was located and thereafter there was another room, behind which, there was Wada of the house. The witness has mentioned that in the kitchen portion, there was wall made of dry stalk of cotton plant. According to the witness, when he had visited the place of incident, the kitchen was smelling of kerosene. It is relevant to notice that the case of the defence is that the deceased had caught fire while preparing tea on the stove and sustained burn injuries. However, panchnama of place of incident indicates that at that time, a small culinary vessel (Tapeli) was placed on burner of furnace, which means that tea was being prepared on the furnace and not on the stove. As per the panchnama, lid of tank of the stove was removed and there was no kerosene in the tank of the stove. The panchnama further shows that furnace was being used for the purpose of boiling water and at that point of time, filter (Garni) was also found lying there, which means that tea was being prepared by the deceased on the furnace and not on the stove. The record does not indicate at all that the deceased was preparing tea on the stove. Further, burnt rags of clothes were also found, which were smelling of kerosene and a matchbox containing matchsticks and three burnt matchsticks were also found at the place of the incident. If the deceased had been preparing tea on the stove, she would not have removed lid of tank of stove, nor the tank of stove would have been found totally empty. Thus, the panchnama of place of incident corroborates what is stated by the deceased in her

four dying declarations that the appellants had poured kerosene over her and thereafter set her ablaze.

27. The contention that testimony of witness Hasmukhbhai Chhatrasinh Solanki shows that the deceased had made statement before him to the effect that she had received burn injuries while preparing tea on stove and, therefore, the appellants should be given benefit of doubt, has no substance. It may be stated that Hasmukhbhai is cousin of Rameshbhai, who was husband of deceased Kailasben. Witness Hasmukhbhai did not support the prosecution and, therefore, was declared hostile and permitted to be cross-examined by the prosecution. During his cross-examination, it was put to the witness that he had stated in his police statement that on inquiry being made by him, the deceased had informed him that her mother-in-law and sister-in-law had poured kerosene over her and thereafter set her on fire, but, the witness maintained before the Court that he had not mentioned this fact in his police statement. However, contradiction has been proved by the prosecution through the testimony of investigating officer Mr. H.G.Gadhvi, who has specifically stated in last part of Paragraph-1 of his examination-in-chief that it was stated by witness Hasmukhbhai in his statement that on inquiry being made by him with the deceased, the deceased had informed him that her mother-in-law and sister-in-law had poured kerosene over her and thereafter set her ablaze. As contradiction is proved by the prosecution,

it will have to be held that witness Hasmukhbhai is a liar and cannot be relied upon, as he has no regards for truth. Further, as mentioned above, the statement made by Hasmukhbhai before the Court that the deceased had informed him that she had received burn injuries while preparing tea on the stove stands falsified by the contents of panchnama of place of incident produced by the prosecution at Exh.14. Thus, the testimony of witness Hasmukhbhai is of no avail to the appellants and they cannot be given any benefit of doubt on the basis of his testimony.

28. The plea that the evidence of investigating officer Mr.Gadhvi makes it very clear that the deceased had also tried to implicate falsely her father-in-law and, therefore, benefit should be given to the appellants is merely stated to be rejected. It is true that the investigating officer has stated in his testimony before the Court that the deceased had stated before him that she was set on fire by her mother-in-law, sister-in-law and father-in-law. However, he has stated that he had recorded the complaint of the deceased as narrated by her. In her complaint, the deceased has nowhere mentioned that she was also set on fire by her father-in-law. Thus, a statement made by the investigating officer inadvertently cannot be used to doubt the prosecution case as is claimed by the learned counsel of the appellants.

29. The plea that testimony of witness Vikramsinh establishes that the deceased was tutored by her relatives, who had surrounded her before her dying declaration was recorded by the Executive Magistrate and, therefore, the appellants should be acquitted, has no substance. What is mentioned by witness Vikramsinh during his cross-examination is that his brother Vijay, Ramilaben, Madiben etc. had surrounded injured Kailasben and were advising as to how the incident had taken place. This statement made by witness Vikramsinh makes no sense at all. It does not indicate that Vijay, Ramila and Madiben, who were near injured Kailasben had advised injured Kailasben to implicate the appellants falsely in the case. Effect of presence of relatives with the deceased before recording of statement is nicely explained by the Supreme Court in Habib Usman v. The State of Gujarat, AIR 1979 SC 1181. The Supreme Court, after noticing human conduct and common course of natural events has observed that it is indeed natural for the friends and relatives of an injured to be with the injured when the injured is admitted in the hospital for treatment. What is ruled therein is that merely because some friends and relatives happened to be with the deceased before his statement was recorded, the statement cannot be thrown out as tutored. Coming to the facts of the case on hand, this Court finds that there is nothing on record, which would suggest that relatives of injured Kailasben had tutored her to give names of the appellants as perpetrators of crime and pursuant to such

tutoring, she had declared before the Executive Magistrate that the appellants had poured kerosene over her and set her on fire. The dying declaration of the deceased was promptly recorded by the Executive Magistrate and, therefore, great weight must naturally and necessarily be attached to the dying declaration. Further, the deceased was on the verge of death and would not commit sin of implicating the appellants falsely. If she had been so minded, she would not have spared her husband and father-in-law, but, the fact remains that injured kailasben had not named either her husband or her father-in-law in any of the four dying declarations made before different persons. Thus, the plea that the dying declaration is tutored version of others, cannot be accepted and is hereby rejected.

30. On reappreciation of evidence adduced by the prosecution, this Court is of the firm opinion that the case of the prosecution stands satisfactorily established beyond pale of doubt by the four dying declarations made by the deceased as well as contents of panchnama of place of incident.

31. The points considered by this Court, were the only points which were urged by the learned counsel of the appellants in support of the appeal. No other point has been urged by the learned counsel of the appellants for consideration of the Court. As this Court does not find any substance in any of the points urged by the learned advocate of the appellants, the

appeal, which lacks merits, deserves dismissal.

For the foregoing reasons, the appeal fails and is dismissed. The muddamal be disposed of in terms of direction given by the learned Judge in the impugned judgment.

At this stage, the learned counsel of the appellants states at the Bar that the appellant No.2 i.e. Manjulaben is on temporary bail upto March 31, 2006, and prays that time of three months to surrender be granted to her so as to enable the appellants to approach higher forum. Having regard to the facts of the case, the appellant No.2 i.e. Manjulaben is granted time to surrender upto June 15, 2006.

[J.M.PANCHAL,J.]

[J.R.VORA,J.]

(patel)